

South Africa Case Study

South Africa: A Case Study

Introduction

This brief study surveys the development of women's rights in South Africa, during three distinct periods of time - the apartheid regime, prior to democratization (pre-1994), the constitutional negotiating and growth process (the 1990s), and women's progress in South Africa (post-2000). Particular attention has been given to how the South African transition to democracy has been shaped by women.

South Africa is an example, contrary to claims in earlier studies of the developing world, that mobilization by women prior to a transition to democracy can lead to gains after the transition--including improvements in constitutional mandates, party politics, and representation. At the same time, not even national leadership can ensure power for all women as many of the women were elected to South Africa's first democratic parliament declined to run again, feeling they could have a greater impact working in their own communities. The political situation in South Africa is ever changing, and there has been much debate about the current shift to neo-liberalism, and role of the women's movement in resisting it. There is no doubt however that women play a central role in developing and constructing African political, social, economic and civil society.

In several African countries, the 1990s saw women's increased involvement in the constitution making process, and South Africa was no exception, where women played an essential role in drafting the new constitution. The constitutional negotiations in the early 1990s created the opportunity to write women's rights into the new constitution, and the onset of democratic government provided a receptive political climate for entrenching these rights in policy and legislation. The main issues that emerged had to do with property rights, land rights, inheritance laws, citizenship laws, domestic violence, rape and defilement. Their hard work ensured that clauses affecting the rights and lives of women were included in the constitution, but this came after an extensive struggle not only within their own parties but also within the entire constitutional assembly. The current Constitution protects many critical rights for women, including the right to equality; the right to freedom and security of the person (including the right to freedom from violence); the right to make decisions concerning reproduction, and the right to security and control over one's own body. It also contains many rights that by benefiting all women will improve the quality of life of even the poorest women. These include the right to education; the right to property; the right to a clean environment; access to adequate housing; access to health care services; sufficient food and water; and social security if people are not able to support themselves or their dependants. This requires the state to try, within its available resources, to meet these needs. These are some of the rights articulated by women in the Women's Charter, which was adopted under the Women's National Coalition campaign in 1994. The independent Women's National Coalition (WNC) had been formed in 1991, after much deliberation, to unite women of all parties and political persuasions. The Coalition brought together 81 organizational affiliates and 13 regional alliances of women's organizations including organizations affiliated with the ANC, the Inkatha Freedom Party, the National Party, Pan Africanist Congress, Azanian Peoples Organization, and the Democratic Party. WNC also brought together interests as diverse as the Rural Women's Movement, Union of Jewish Women, and the South African Domestic Workers Union. Over three million women participated in focus groups organized by WNC to voice their opinions on women's concerns. Regional and national conferences were held and a Woman's Charter was drafted and endorsed by the national parliament and all nine regional parliaments in 1994. The charter addressed a broad range of concerns, including equality, legal rights, economic issues, education, health, politics, and violence against women. The Constitution allows for the charter to be used a basis for reforming government policy.

Overview of Paper

This paper looks at the question of women's rights in South Africa. It briefly tracks the history of women's specific struggles for human rights and the achievements of 1994 and beyond. It notes key constitutional advances impacted by the women's movement and then looks at the nature and scope of progress. The paper examines women's rights in South Africa within a three-pronged framework: 1. Violence against women; 2. Women's political participation; 3. Customary laws within the constitutional democracy.

I. The Role of Women Activists prior to the Constitution

i. Political Participation

Although rarely mentioned in studies of democratization in Africa, women's movements actively sought to participate in the political reform movements of the 1980s and 1990s and in many cases found themselves the only group defying repression by the authorities. Like student, worker, human rights, and other such movements, they openly resisted corruption and repressive regimes through public demonstrations and other militant action.

The struggle for women rights in South Africa has been a long process, profoundly shaped by race, class and gender. At the beginning of the twentieth century, no women could vote or own property. By the early 1950s, white women could vote (from 1930). It was only at the end of that century, in 1994, that black women won the right to vote, and all women could make claims to legally enforceable human rights.

For black women, the struggle for political rights was bound up with the national liberation struggle. The new political opportunities offered by the transition from apartheid to democracy, the creation of an autonomous organization for representing the women's movement and the consolidation of the notion of equality within the African National Congress (ANC) transformed the fortunes of the women's movement in South Africa. The beginning of a process of negotiated transition to democracy offered new possibilities for the women's movement to pursue its claims at a national political level. The nature of this transition—the creation of a liberal democratic state in which citizenship rights were accorded irrespective of race, gender, or ethnicity—unexpectedly allowed feminists to articulate an agenda of equality that unseated nationalist formulations of women's political roles. The unbanning of liberation movements allowed the demands for the equality and representation of women and their inclusion in decision making that had been expressed primarily within the ANC to be expanded to the entire political system. The creation of a national representative structure for the women's movement, the Women's National Coalition (WNC), provided the strategic and organization vehicle for women activists to articulate these claims independently of the ANC. The formal commitments to including women at all levels of decision making and gender equality concerns in policy frameworks created an ideological basis from which to make women's demands a benchmark of substantive democracy.

This history of political activism placed women in a position to participate in government and to place gender equality on the political agenda. The success of South African women in moving from active participation in the liberation struggle to active participation in government has been exceptional on a world scale. In taking gender seriously, the ruling African National Congress (ANC) party in South Africa appeared to reverse the trend set by many liberation movements elsewhere: namely, women being mobilized as agents in struggles around class and race, yet denied the imperative of addressing gender subordination. Shortly after coming to power, the ANC adopted a national strategy for advancing gender equality. By doing so it demonstrated that it could rise above the limitations of its erstwhile 'woman question' position and learn from the experience of other countries that had tried to institutionalize gender policies and structures. This in turn served to place South Africa at the cutting edge of experience in state-initiated gender policies and 'national machineries for women. The result has been a political representation that is grounded in the experience of a united women's movement in the transition to majority rule and a firm policy consensus towards gender equality within the ANC. This has enabled women politicians to entrench gender equality goals within government discourse. Yet, the success has come with the price of a women's movement that has lost its strong leaders to government, and women politicians who lack the support of a strong women's movement. Thus, in the moment of

greatest victory South African women lack the mass movement that propelled them to success, suggesting that the struggle is not done with yet.

ii. Violence against women

The United Nations Declaration on the Elimination of Violence Against Women defines violence against women (VAW) as: "Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women – including threats of such acts, coercion or arbitrary deprivation of liberty, whether in public or in private life." Violence becomes gender-based whenever particular acts are directed predominantly at either women or men. The fact that women are much more likely than men to experience particular crimes is no accident, indicating that beliefs about maleness or femaleness, or the circumstances of being male or female, play a significant part in violence against women. Acts of violence overwhelmingly experienced by South African women include:

- sexual harassment;
- rape;
- domestic violence;
- forced prostitution, or trafficking, of women;
- female genital mutilation/circumcision (less common).
- particular kinds of murder such as witch burnings; rape-murders; sexual serial killings; intimate femicide (murder by a husband or boyfriend);
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Not only does South Africa have one of the highest per capita rates of reported rape in the world, but studies that seek to identify the actual level of violence and abuse have documented levels of between 19% and 40%. These figures correlate with estimates of coercive sex. In general, studies in South Africa have found violence in relationships to be so endemic that men and women often accept coercive and even violent sex as 'normal'. For example, research in urban Gauteng found that more than a quarter of women (27%) and nearly a third of men (31%) agreed that forcing someone you know to have sex with you is never seen as sexual violence. The problem of violence against women in South Africa is a complex one. It is both an individual and a social problem. It is embedded within, and emerges from, a history of unequal social, economic and cultural relations.

The discourses about the politics of sexuality and sexual violence in South Africa have been long shifting. It is shown that communities that have experienced high levels of oppression and violence of this nature in other countries (African-American, Maori-New Zealand, and Aboriginal-Australia) continue to experience high levels of violence including gender based violence. In many instances the pain of colonisation has been internalized into abusive and self-abusive behaviours, often within families and communities. The multiple layers of acute and overt violence experienced by such communities at the hands of the colonial state can lead to complex expressions of rage, within and across generations. The use of violence by the apartheid state and in the struggle against apartheid further reinforced its use as a legitimate form and expression of opposition.

Authors such as Deborah Posel have argued that violence in South African has been historically constructed within the realm of secrecy, making it difficult for activists to even get authorities to acknowledge violence against women, much less organize against it. She argues that sexual violence was made 'secret' and invisible by a) the patriarchal and racist politics of the apartheid state which used various strategies of legal and judicial minimization to limit public discussions of sexual violence; b) by inter-generational silences on issues of sexuality within black African communities; c) moral shame and cultural stigmas within all communities, especially in cases of child sexual abuse. Pre-Constitution, there wasn't even the space to discuss these issues, and while in present-day Africa a discursive space has opened to speak about issues of sexual violence within the public sphere, due in part to constitutional changes and changes within human

rights discourses internationally, this has been shaped into more of a moral panic. Sexual violence was discussed publicly less as a social problem and more as a sign of moral and political crisis within post-apartheid South Africa, as a trope for violation, the moral frailty of the nation and of South African manhood. In this sense then, sexual violence has become a site of contestation between political elites and not about the very real problem women and children in particular face. The struggles of women over the past 30 years has been to get past the colonialist interventions into gender based violence and culture, some of these which has been addressed in advanced in formal legal structures, but for a variety of reasons, continue to be ineffective.

iii. Customary Law

Customary law has long been both a cause and a result of racism in South Africa. Indigenous African customary law also fell prey to the apartheid system which created a dual legal system and only recognized customary law insofar as it was used to perpetuate discrimination. The customary law recognized by the apartheid state was codified and changed so fundamentally from its communal roots that it became little more than an “invented tradition”.

The first piece of legislation to recognize customary law was the Native Administration Act of 1927 which limited the application of customary law to disputes between parties who were black. These matters were heard in Native Commissioners Courts and Headmen’s Courts which, according to the Black Administration Act, could not apply customary law where it was against public policy or natural justice. In 1986, the Native Commissioners Courts were abolished and the Magistrates Courts took on their function.

In 1988, an Act was passed which made it possible for courts to apply customary law if and where the court decided that customary law was the applicable legal system and where the customary law rule was easily ascertainable. The discretion of the court to apply customary law was again subject to the proviso that customary law could not be applied where it was contrary to public policy or natural justice. The notion of ‘public policy’ was used by a minority, dominant white population to entrench and impose their value system. An example of this is the way in which courts then dealt with the recognition of customary marriages. In the Appellate Division case of *Ismail v Ismail* the court found that it could not recognize customary union because it entailed the recognition of polygamy which was contrary to public policy. The effect of the “public policy” proviso was to subjugate customary law and to ensure that it always remained subordinate to civil law.

ii. Affect of women in constitutional-building

i. Political Participation

Women’s broad, nonracial organizations are not new in South Africa. The Federation of South African Women had been a voice for women in the 1950s and the organization was revived in the 1980s, although with limited success. Women’s organizations, particularly along regional lines, had a strong presence throughout South Africa. Just prior to constitutional negotiations, the Malibongwe Conference convened by the ANC, reopened the idea of a need for a women’s organization. Following Malibongwe, the idea of a national women’s organization embracing non-ANC members was raised in several forums inside the country. It was expected that the ANC Women’s League, by 1991 the sole political representative of progressive women’s interests at a national level, would be the driving force of such a structure and would provide progressive political leadership and content to the program of action. And yet, the conviction that the ANC Women’s League was not a sufficient vehicle to advance women’s claims was widely held, even among women within the ANC.

These needs were considered in the building of a new organization. In September 1991,

representative from political parties, women's organizations, advocacy NGOs, and grassroots organizations, met at the invitation of the ANC Women's League to discuss the possibility of a national women's structure that would link women across racial and ideological divisions. There were two things in particular that made this type of organizing stand out: that a women's organization was being built with groups and individuals who were outside of the congress fold, and secondly, that the ANC Women's League was a prime mover behind this process.

The meeting agreed that even though women were divided by race and class, sufficiently strong grounds existed for a common struggle, although at this stage the grounds were defined in the broadest possible terms to mean ensuring that women's interests were addressed in postapartheid South Africa. It also agreed that because of the differences among women, the organizational form should be that of a political coalition based on gender, rather than a single new organization. This culminated in the launch in April 1992 of the Women's National Coalition (WNC) as a broad front of 70 organizations and eight regional coalitions. Thus began what Ginwala describes as "a conspiracy of women." The moment was ripe for an alliance between diverse women's organizations, as it became clear during the multiparty negotiations that the political parties were disinterested in honoring demands for women's structures.

The objective of the WNC was to carry out a program from April 1992 to April 1993, although the mandate was later extended until June 1994. The WNC's single purpose was the drafting of a Women's Charter of Equality, which would represent the demands of the women of South Africa. The WNC constitution provided for three categories of participation: national women's organizations, national organizations that included women members, and regional coalitions of women's organizations. The outcome of their joint action was the Women's Charter for Effective Equality, which provided a template of the substantive claims to gender equality that came to be reflected in the Constitution and subsequent gender policy and legislation. The strategy was to present a single 'women's agenda' that would constitute women as a coherent constituency, yet also locate their difference at the heart of that agenda such as access to social services and benefits, housing, land and economic opportunities.

The WNC was a significant step towards challenging the marginalization of women in politics and creating a political movement that was driven by female leadership. Regardless of the differences between the women, there was a collective interest amongst them to ensure the representation of women in the decision-making process. The goals of the WNC became broader than just including women in the political decision-making process, it was challenging the deep structure of inequality in South African society. Although representation itself is an imperfect means to full citizenship, it is a necessary precondition for women's formal and recognized participation in political, social and economic life. The WNC's success lay in its nuanced understanding of the organizational nature of the women's movement. Apartheid had shattered any illusions of sisterhood in South Africa, white women's gains were often made at the expense of black women. Shireen Hassim describes it as such:

The white women's suffrage movement, for example, was successful in 1930 precisely because it allowed the Hertzog government to reduce the importance of the few remaining black voters in the Cape Province (Walker, 1991). By their complicity in this political maneuver, white women placed their racial and class concerns above any solidarity between women. For decades afterward, there was little political trust between white and black women except in organizations where black leadership was established and accepted. Given this fractured history of women's politics in South Africa, and above all the powerful sense in women's organizations associated with the ANC and the Pan Africanist Congress that women's struggles could not be separated from other political struggles, the WNC never assumed the existence of a "sisterhood" (Meintjes, 1996). Indeed, from the beginning the WNC argued that it was an organization based on solidarity in pursuit of a narrow agenda. Political differences were acute: no common language existed in which to speak of women's needs, particularly as the potentially "common" discourse of feminism was itself highly contested. As a result, while the mandate of the WNC slowly widened to include issues of violence against women, it was always understood that the terrain of common purpose was very narrow.

But the charter was not a result of either the work and efforts of black women or white women, but rather a product of the women's movement in South Africa organizing along ideological terms. In fact, the differences that threatened to undermine the negotiating process cannot be categorized along racial lines, are rather a reflection of broader ideological differences.

The Charter Campaign was an ambitious proposal. The process needed to highlight what women had in common as well as acknowledging their differences. The Charter was to be the basis of the demands of the WNC in the constitutional negotiations, creating a noticeable unified statement for women and about women, in a political climate that always ignored their interests. While recognizing a plurality of interests, the Charter recognized the need to prioritize the needs of the poor and economically vulnerable. It was a sign of the need to recognize substantive equality within the Constitution, recognizing that the socio-economic needs of women have been influenced by a long historical process of exclusion and exploitation of women.

The interim constitution was completed before the Charter was finalized, in 1994. It was a significant accomplishment - a national (if contested) consensus among women. As Murray and O'Regan suggested in 1991, it 'could become a powerful political document, providing a standard against which to judge legislation and public action politically, if not legally'. The Charter contained demands for substantive equality describe setting an 'aspirational' objective that went beyond limited conceptions of formal equality. In making demands for greater female representation in the legislature, the assumption of ANC women activists was that these demands would be best addressed by women representatives and that the Charter would form the political touchstone for legislative and policy interventions.

Women's gains continue to be made in a path created by women long engaged in the movement. The result of gains made in the Constitution, allowed for such initiatives as the adoption of women's budgets. In South Africa this initiative was coordinated by the Department of Finance and involved collaboration among NGOs and the parliament. It involved analysis of existing budgets to determine the differential gender impact on women, men, girls 21 and boys, with the intention of making recommendations for future budgets to improve the way in which funds are allocated. In South Africa, women were able to put in place a Commission on Gender Equality to ensure that the laws were fully implemented. Women fought to be part of the budget process so that the budget might better reflect women's interests. They ensured that the Labour Relations Act recognized maternity rights and women's rights against sexual harassment in the workplace. They also lobbied for an Employment Equity Bill that requires employers to employ fairly across race, gender and disability. In addition, they won the right to choose with the Termination of Pregnancy Bill.

ii. Violence against women

The past several years have been marked by increasing activity in the area of violence against women in South Africa. Through the efforts of the women's movement, service providers, non-governmental organizations (NGOs) and the academic community, violence against women has been brought to the forefront of public and political attention. Along with increased efforts to secure appropriate services and legal reform for survivors of gender-based violence, there has also been increased research, aiming to provide more substantive information and discussion about the nature, scope and dimensions of the problem.

South Africa is obliged under international law to ensure that women are guaranteed respect for their human rights and fundamental freedoms on the same basis as men. This obligation extends to the provision of an effective remedy if those rights are violated. In many cases, the state does not provide an effective remedy to South African women who are subjected to violence. On December 15, 1995 South Africa ratified the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), thus committing itself to a wide range of obligations under international law. One year later, on December 10, 1996, international human rights day, President Nelson Mandela signed into law a final constitution for South Africa. Like the

interim constitution that was negotiated before the elections and governed the period until the final constitution came into effect on February 4, 1997, the final constitution prohibits discrimination on a number of grounds, and it has added pregnancy and marital status to a list already including sex, gender, and sexual orientation. Specifically, violence against women violates a number of clauses in the South African Constitution's Bill of Rights. These include:

- Section 9: the right to equality;
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- Section 10: the right to human dignity;
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- Section 11: the right to life;
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- Section 12: the right to freedom and security;
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- Section 13: the right not to be subjected to slavery, servitude and forced labour;
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- Section 14: the right to privacy (stalking contravenes this);
- • - Section 18: the right to freedom of association (abusers often control who their partners see);
- • - Section 21: the right to freedom of movement and residence (abusers often control their partners' movements; also women curtail their movements to avoid rape);
- • - Section 27: the right to have access to health care, food, water and social security; (potentially this refers to State obligations to provide medical care to women infected by HIV/AIDS as a result of violence, as well as an obligation to assist women who have left their abusive partners and, as a result, have become destitute or unable to support themselves and their children);
- • - Section 34: the right to have access to courts.
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Women have played a significant role in addressing gender violence. Legislation in South Africa dealing specifically with domestic violence dates back to 1993 in the Prevention of Family Violence Act (PFVA). However, soon after the PFVA was introduced aspects of its provisions were questioned by attorneys who thought men's right to a fair hearing was being violated by the PFVA. After soliciting the opinion of both the Department of Justice as well as the Family Advocate, the South African Law Commission (SALC) established in February 1996 a project committee comprising a number of feminist lawyers and experts in the area of domestic violence to review the legislation. As a result, the Domestic Violence Act (DVA) was passed in 1998 and operationalized a year later on December 15 1999. Its passage was not without controversy, with some of its key innovations challenged by two male non-feminist committee members. The fact that the more progressive version of the Act was adopted was the outcome of the following conditions: that women's organizations addressing domestic violence mobilized around the Act; that key networks between women politicians and bureaucrats existed within the state; the presence of a democratic discourse and framework that integrates gender; civil society organizations with the skills and knowledge to intervene in and negotiate with complex state processes and apparatuses; and finally, key individuals in leadership positions committed to championing issues constantly.

The DVA was hailed as groundbreaking in a number of respects. It included a comprehensive definition of domestic violence and covers any kind of "domestic" relationship, including dating relationships (regardless of duration), unlike the previous law which applied only to married couples. The act allowed protection orders to be issued free of charge and around the clock by the courts and the police would be able to arrest a suspect without a warrant. Social workers and police officers were compelled by law to report possible ill treatment and to tell victims that they are entitled to protection, facing the possibility of fines if they don't. Police powers to arrest were explicitly set out and magistrates' powers to protect abused women were widened. Court proceedings were to be held in camera.

But since the beginning the South African Government said it was skeptical of whether it could fulfill the obligations of the Act and the continued under-resourcing of courts and police stations has prevented the effective implementation of the Act. It lacked a strategy and budget for implementation. Studies' findings regarding police ineffectiveness in implementing the DVA have been given further weight by no the then-national Police Commissioner Jackie Selebi. In 2001 he was quoted as saying that the DVA was not practical or implementable and was "made for a country like Sweden, not South Africa"

The DVA has also been undermined by other factors, including police perceptions of domestic violence, fragmented service provision from the courts, the police and the health sector and the lack of information for applicants regarding the application procedure and a continued unwillingness by police to intervene in "household disputes." Lisa Vetten has found that: "progressive legislation, combined with unprogressive attitudes among law enforcement agents, created negative attitudes towards complainants, resulting in secondary victimisation of abused women and/or a failure to act according to the legal obligations set out in the legislation. Negative attitudes towards complainants were found to be related to complainants' withdrawal of charges."

The medico-legal concerns are another issue in violence against women. There is no question that HIV/AIDS has had a significant impact on the discourse of gender based violence in South Africa. As South Africa experiences the turbulent aftermath of apartheid and the ravages of HIV/AIDS, levels of violence have reached extremely high rates.

Regardless of the achievements that women have made in South Africa in regards to political participation, it continues to be a struggle in South Africa to achieve sexual equality and equal rights between men and women despite the fact that constitutionally enshrined gender and sexual rights are firmly in place. The persistence and severity of domestic violence has made constitutional and legislative rights for protection and gender equality ineffective as has inconsistency in gendered legislation and their implementation; inconsistent reprimands culturally, socially, and institutionally for discriminatory and violent behaviours against women; the persistence of rights for customary laws that discriminate against women; and unequal economic access to laws due to an unequal gendered division of labour. Writers like Grace Khunou have concluded that unless changes in other parts of South Africa's social dynamic change and unless the gendered division of labour within the household and within the economy is overcome, constitutional rights and legislative changes will have little impact on preventing violence against women.

There has also been a limited impact of constitutional protections against discriminations based on sexual orientation and gender. Although there are protections for sexual orientation and against gender discrimination as they are enshrined and guaranteed in the South African Constitution of 1996 it has been found that LGBT peoples face persistent physical, emotional, and sexual violence faced. The research suggests that at the core of violence against non-white LGBTs is the persistent perception within the mainstream that homosexuality is a colonial import, 'un-African,' Un-Christian, and thus a choice. Additionally, the research concludes that economically marginalized lesbian women from the townships (mainly Black and Coloured women) tend to face not only more sexual violence in the form of 'curative rapes' and gang rapes, but that it is more difficult for service providers and to address these forms of sexually motivated hate crimes because of the silences and taboos that exist socially around the issue of sexuality in general. Scholars conclude that in order for the rights afforded by the Constitution to become effective for LGBTs in South Africa, the government and the state itself must play a key interventionist role by supporting anti-homophobic education campaigns, and funding sensitivity and educational training programs for service providers such as the police and other criminal justice agents who directly deal with survivors of homophobic/lesbophobic hate crimes.

But although, in South Africa, violence has become normative and, to a large extent, accepted rather than challenged there are national institutions in place combating these effects. In a

celebrated case, Ghia Van Eeden claimed that the State owed a common law duty of care to potential victims to protect them from violent crimes, after she was raped by an escaped convict. In a path-breaking decision, the Supreme Court of Appeal (S.C.A.) found that a duty of care did indeed exist and that its execution had to be considered in line with the constitutional requirement to protect women's right to be free from violence and the constitutional obligation to develop the common law so as to promote the spirit, purport and objects of the South African Bill of Rights. Unusual for sub-Saharan Africa, there is also strong national research institute and rigorous data-based scientific literature describing the situation of HIV/AIDS and its impact on women and marginalized communities. Much of the research has focused on violence against women. The evidence for the need for positive change is solid. The potential for positive change in South Africa is also very strong. There are suggestions that an African renaissance based on the principle of ubuntu has already begun on national, community, family, and individual levels. If so, it can lead the way to a society with decreased levels of violence.

iii. Customary Law

Women played an essential position in evaluating the role of customary law in building a new constitution, including participating in the multi-party negotiating process and ensuring the intersection with international conventions including the Convention on the Elimination of All Forms of Discrimination Against Women.

One of the most controversial aspects of the constitutional building process emerged from women's groups opposition to enshrining the right to customary law. The South African Constitution, together with later policies and legislation, affirmed a commitment to gender rights that is incompatible with the formal recognition afforded to unelected traditional authorities. The Constitution's enshrinement of gender equality and prohibition challenged traditional and patriarchal cultures. As such, it was not surprising to see traditionalists call for the restoration of cultural practices and values, some of which violated the spirit of the Constitution and negatively impacted on gender equality. The Constitution is itself a transformative document which supercedes all law, outlaws discrimination based on a number of specific factors including gender which was able South Africa closer to its goal of gender equality by ferreting out legislation that either directly or indirectly based on gender.

As such, the battle for inclusion of a strong equality in the Constitution faced numerous political and social obstacles. The Women's Charter demanded that "culture, custom and religion, insofar as they impact upon the status of women in marriage, in law and in public life, shall be subject to the equality clause in the Bill of Rights." This clause had wide support by many women's organizations involved in the coalition. The Rural Women's Movement had been formed in 1986 as a forum to challenge the exclusion of women from participation in rural community structures, and expanded its vision to include challenges to male authority within the family. The WNC had mobilized a broad consensus on the need to lobby for the reform of customary law and was supported by technical expertise provided by the Transvaal Rural Action Committee and the Center for Applied Legal Studies. The Rural Women's Movement organized workshops on the issue and picketed outside the negotiations' venue. But these activists were met head-on by traditional leaders. They were demanding the exclusion of customary law from the bill of rights; the exclusion of customary law, culture, and religion from the equality guarantee. They also asked that communities subject to customary law and traditional authority should remain exclusively subject to such authority.

By its 1994 election platform, the Reconstruction and Development Program, the ANC had committed itself to the reform of customary law. When the agreement on equality was made in relation to the interim constitution, the negotiators set up two bodies that would have a role in the process of reforming customary law: one to represent the interests of women (Commission on Gender Equality) and one to represent traditional leaders (Council of Traditional Leaders). The Commission was established as a statutory body entrenched in the constitution, empowered to monitor and promote the implementation of gender equality. The Council of Traditional Leaders

was given narrower advisory powers: the right to have any bill on customary law referred to it by parliament and the power to delay a bill for up to 60 days; in the final Constitution the Council was to be established by national legislation. But the women's movements and its opponents were not able to resolve the tensions between equality and culture, the final rights conveyed on each party were delayed so as to be resolved by the new government and the Constitutional Court.

The debates around the status of the customary law, lead to considerable uncertainty about what the Constitution says regarding the right to culture and custom. The extent to which the right to practice one's culture is protected in the Constitution, such as s.15, s.30 and s.31 which respectively deal with the rights to belief, religion and opinion; language and culture; and the rights of persons belonging to particular cultural, religious and linguistic communities is contained in a number of provisions. The common feature in all these provisions is the internal limitation that provides that the right is recognised to the extent that it is not inconsistent with other rights in the Constitution. The debates, however, have continued as if the internal limitation does not exist. The writer Sibongile Ndashe has argued that these debates have been rendered academic by the South African Constitution, as chapter 2 provides that the Constitution is the supreme law of the country and that any law or conduct inconsistent with it is invalid. Section 31 of the Constitution deals with rights to belong to cultural, religious and linguistic groups; and the arguments relating to women's rights and customary law have arisen in the context of women as members of cultural communities. The internal limitation which essentially provides that group rights cannot be exercised in a manner inconsistent with the Constitution, was secured during the Constitutional Assembly when groups such as the Inkatha Freedom Party and Contralesa opposed the certification of the final Constitution on the basis that it made inadequate protection for customary law and the institution of traditional leadership. Over the past 10 years, the issue was left alone but the debates continued along parallel lines. There are a number of provisions in the Bill of Rights that continue to raise serious contentions. These include reproductive autonomy, particularly termination of pregnancy, prohibition of discrimination on the basis of sexual orientation and the right to life, which was among the many rights used in support of finding the death penalty unconstitutional. There is, however, a distinction in how this particular debate and the debates around these latter rights occur. Regarding these, it is argued that the Constitution has given rights where these rights were not supposed to have been given or that the Constitution is against natural or divine law. There is, however, no denying that these rights are in the Constitution, and more importantly, that they are protected.

iii. Policy Issues arising in Women's Equality concerns i. Political Participation

While women in South Africa have made enormous strides in gaining recognition for their particular political disadvantages, there has been a slower translation of political rights into social rights. While this is partly a consequence of the general slowness of policy development and implementation, there also exist inconsistencies between the rights-based framework of the Constitution and social welfare. Compounding these inconsistencies, the women's movement has struggled to define a coherent role since the transition to democracy, with a significant section of the movement's leadership being incorporated into the new institutions of governing (i.e. into gender desks in government, into Parliament, and into institutions such as the Commission on Gender Equality). Some commentators believe that that the movement has not developed the organization of ideological capacity to hold government accountable in terms of its commitments to eradicating gender inequalities.

The greatest impact has been felt amongst the women's movement. Some argue that the women's movement largely transformed from a vibrant and diverse social movement born out of the anti-apartheid struggle, to a "development partner" of the new South African state which has had long-term costs for meaningful democracy. Firstly, it has reduced the ability of the movement to debate the underpinning norms and values of policy directions, as these are placed outside the terms of reference in many policy development processes. Secondly, because the women's movement has spent less time focusing on determining the specific interests and needs of

different groups of women, the movement's ability to impact laterally on the political agendas of other social movements and in civil society more generally has been severely diminished. The consequences of this have been, as Hassim writes, that "the idea of gender equality is thus increasingly reduced to a vague set of "good intentions" that are rarely translated into meaningful policy..." Ultimately, she concludes that a strong women's movement must be able to engage in norm-setting debates at the broadest levels within society, which will require the participation of economically and socially diverse women.

Currently, the movement is limited to piecemeal interventions in policy and legislation which ultimately alienates women at the grassroots and within civil society because issues of cultural norms and everyday practices are difficult to address when the agenda is reforming the state. Moreover, women's access to the state has in part been reduced to links to the former women's movement "comrades" who have now moved into the political arena which reduces feminist struggles to inclusion in the state rather than transformation of unequal gender power relations.

ii. Violence against women

Violence against women has been one of the most prominent features of post-apartheid South Africa. While estimates of the extent of violence vary, the issue has dominated national public debates and galvanized community-based activism and NGO intervention. The extent of the problem was also recognised by the ANC government from relatively early in its tenure. The National Crime Prevention Strategy (NCPS) of 1996 established crimes of violence against women and children as a national priority (a status such crimes have continued to enjoy in subsequent national policing strategy documents) and a number of legislative reforms have also been instituted in this area. These include mandatory minimum sentences for certain rapes (the Criminal Law Amendment Act, no 105 of 1997); tightening bail conditions for those charged with rape through the Criminal Procedure Second Amendment Act (no 85 of 1997); and passing, in 1998, the Domestic Violence Act (DVA) (no. 118 of 1998). National Policy Guidelines for the Handling of Victims of Sexual Offences were also finalised in 1998 and the Policy Framework and Strategy for Shelters for Victims of Domestic Violence in South Africa in 2003 (Department of Social Development, 2003). Specialist facilities have also been set up such as family courts, specialist sexual offences courts and Thuthuzela centres. Thus the first ten years post-1994 have been marked by increasing state intervention into the problem of violence against women.

But regardless of the legislation in place, violence against women is continuing to have a devastating impact on society in South Africa. Estimates on the incidence of domestic violence and its impact: -

- One in two women (49%) attending a Community Health Centre in the Western Cape report experiencing past or current abuse by their partners or husbands.
- • 84% of these women suffered significant physical or mental health consequences as a result.
- • 64% of women report the use of weapons as part of the abusive assault.
- • The Department of Justice estimates that one out of every four South African women is a survivor of domestic violence.
- • One in six women is regularly assaulted by her partner, according to the Advice Desk for Abused women.
- •
- At least one in four women is forced to flee a life-threatening situation in her home at some point in her life, according to the Advice Desk for Abused Women.
- • 43% of working men interviewed in a pilot study in Cape Town reported abusing their partners.
- •
- A study of 83 women in the Western Cape found that 14% had experienced sexual assault at the hands of their partners.

- • - 60% of teenagers in a study in the Western Cape reported physical assault by male partners.
- • - Violence by male partners is a consistent feature of teenage sexual relationships according to a qualitative study conducted in Khayelitsha, Cape Town.
- • - Both Post Traumatic Stress Disorder and major depression were found to be more common in female patients with a history of domestic violence (35.3% and 48.2% respectively) than in those without (2.6% and 11.4%).
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Statistics such as those above, and the inconsistent and faulty application of the law by the police and other criminal justice agents in South Africa, demonstrates that progressive legislations such as the Domestic Violence Act (116 of 1998) does not reach the needs of women on the ground. While in principle the Act has challenged the 'hands off' approach of the pre DVAct era, the 'long arm of the law' will not, and has not, reached the needs of victims and survivors of domestic violence because the agents responsible for its implementation are ill informed about the structural power dynamics of violence in the home. Moreover, without a strong and committed NGO sector and civil society willing to monitor the implementation of the Act through education and training, it will remain more of a theoretical exercise than a practical solution to domestic violence against women.

Feminists like du Toit have argued that another policy/legal issue to bring to the forefront is the consideration that rape is a citizenship issue because the subjective experience of rape devastates women's citizenship. Interrogating why rape has become such an everyday, banal part of life in South Africa, she concludes that rape has become institutionalized because it has been turned into a specifically 'women's issue' for two main reasons. First, male sexual violation is not defined as rape according to South African popular discourse or law. Second, the governments failure to respond effectively to the ways in which gender based violence and the HIV/AIDS crisis intersect, women have born the brunt of the caring work in families where neither boys or girls are equipped to promote democratic citizenship. Politically, the consequences of this for women have been that they are forced back into the private sphere. As such we need to move discussions of rape back in public discourse and treat it as a public policy issue.

iii. Customary Law

The various constitutional rights that protect the right to culture or which, directly or indirectly recognize African Customary Law as a body of law are all qualified to the extent that the rights and recognition are subject to the Bill of Rights and the Constitution.

Traditional leaders have been central to the lives of African people for centuries. However, with the advent of colonialism, customs, particularly in reference to the administration of justice were significantly influenced by Western systems of government. A result, customary law became a hybrid of African practices and aspects of the Western system of law. Moreover, the different South African provinces, independent states and homelands had different forms of customary law, mainly as dictated by their respective colonial governments' approach to African affairs. It could therefore be said that legal pluralism forms part of the South African legal system. This approach is evident in the work of the South African Law Reform Commission which seeks to preserve forms of traditional justice and allow them to operate within the post-1994 democratic dispensation:

Development of the legal framework delineating the laws applicable to the researched traditional authority Year Legislation Purpose/Results 1878 Natal Code of Zulu Law²⁶ To eliminate uncertainties regarding customary law. 1881 Ordinance 11 of 1881 Recognised African civil law. 1885 Ordinance in Law 4 of 1885 Recognised African civil law subject to the repugnancy clause. Natal Native High Court & Transkei Native Appeal Court Handed down written judgments that served as precedents on customary law. 1927 Black Administration Act Created separate court system for black South Africans. 1967 Rule 6(1) of Chiefs and Headmen's Civil Courts Rules, No

R2082 of 1967 Government Gazette Extraordinary No 1929 Required the traditional court to record the names of the parties, particulars of claim, particulars of defence, judgement and the date of judgement. 1951 Black Authorities Act Created 'homelands'. 1988 Law of Evidence Amendment Act Provided for admissibility of evidence of the existence of custom different from the official version. 1993 Interim Constitution of the Republic of South Africa Act Provided for the recognition of customary law subject to the Constitution. 1996 Constitution of the Republic of South Africa Act Chapter 12 dedicated to traditional leadership and section 166(e) providing for the recognition of courts outside the state system. 1996 Schedule 6 to the Constitution Provided for the inclusion of all pieces of legislation from different homelands and independent states into the South African law. 1997 The Abolition of Corporal Punishment Act Abolished traditional leaders' right to apply corporal punishment. 2003 Traditional Leadership and Governance Framework Act Regulates traditional leadership and seeks to put it in line with the country's Constitution. Source: Boyane Tshehla, "Traditional Justice in Practice: A Limpopo Case Study" Institute for Security Studies <http://www.iss.co.za/pubs/Monographs/No115/Chap2.htm>

Since the creation of the Constitution, there have been advances made in recognizing the inherently patriarchal nature of customary law, such as the Customary Marriages Act. The Act was passed and assented to in 1998 but only came into effect in November 2000. The Act aims, not only to recognize and celebrate African Customary Law, but also to protect women by regularizing customary marriages and bringing them into the mainstream legal system. In balancing the recognition of customary law with the protection of women who marry under customary law, the provisions of the Act illustrate the difficulties that arise from the recognition of Customary Law as a body of law. The 'customary law' that is being recognized by the Act is not the customary law that was codified by the Apartheid state and that was distorted and convoluted to meet the ends of the Apartheid state. Instead it recognizes the law and custom that is practiced on a daily basis, as well as bringing certainty to the process, by containing minimum requirements for marriage. What the Customary Marriages Act most importantly serves, is the fundamental right to choose your spouse. But there continues to be work done, most importantly in making constitutional rights, lived rights for the women who have least access to them.

iv. Priorities for Women's Activism in South Africa

i. Political Participation

In the past 20 years feminist activists have begun to pay closer attention to the ways in which the formal institutions of liberal democracies have failed women, engaging in renewed discussion about women's political parties and the state. And with good reason. South Africa's negotiated transition promised significant gains for gender equality, as women acquired one-third of the seats in the national parliament, secured constitutional protection, and began a process of legislative and institutional reform. Crossing the boundary into formal political roles has transformed women's notions of themselves as political actors and altered the ways they participate in the politics. Once apartheid was dismantled, the programs of racial and gender empowerment theoretically should have proceeded at the same rates, given the rhetorical commitments of the liberation parties: "These strategies are based on the view that if properly constituted, African democracies can overcome the historical legacies of women's subordination and that new relationships can be built between state and civil society, based on democratic participation, the development of policies that are responsive to the needs of poor women, and accountability of elected leaders to citizens. The demands to break down the barriers to equal political participation reflect an important tone in contemporary women's movement politics in Africa, as women's movements on the continent begin to take formal politics and political institutions seriously. They signal that there is room for women's agency to shape politics, and that formal political rights are an important precondition for advancing equitable social policies. The quota campaigns and the emphasis on representation are undoubtedly part of an important renewal of feminist activism on the continent. Yet these developments raise a number of critical questions for feminists about the nature of contemporary political institutions, the possibilities for radical change through the state, and the kinds of processes within the women's movement that

need to accompany state-focused political strategies.” Life for the majority of South African women, however, continues to be marked by socio-economic hardships, patriarchal domination, and gender violence. But the roots of women's continued inequality are found within the western reform models utilized by the anti-apartheid movement that reproduced public/private, male/female dichotomies in state institutions, thereby entrenching male discourse and power. In order to disrupt the power of the patriarchy women need to challenge male domination within the domestic sphere as well as challenging gender discrimination in public political spaces.

ii. Violence against women

Internationally, there has been a dramatic increase in the scope and magnitude of clinical and investigative interest in domestic violence. However, much of this research and theory stem from Western countries with socio-political and historical experiences that are distinctly different from those of women in developing countries such as South Africa. It is for this reason that more substantive and quantitative data needs to be procured. Addressing such endemic violence also requires a comprehensive range of both prevention strategies, and interventions to deal with the aftermath of violent incidents. Consequently, what are the interventions required by service providers and government departments for dealing with violence against women? Understanding the experiences and perceptions of survivors of violence should be the first step in making policy decisions that are aimed at promoting women's interests. Therefore we must focus not only on the impact of violence against women in urban spaces in South Africa, but also on their experiences with service providers.

The legal development of the constitutional rights that protect women against violence remains limited and more work needs to be done to define the ambit of protection afforded by these rights. For example:

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- The need to develop the full meaning of the constitutional values of freedom and equality in the area of violence against women and make them part of everyday discourse
- • § The need to develop the full ambit of protection of the right to freedom and security of the person
- • § The extent of protection afforded by the rights at a private level has not yet been tested.
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Despite a political will to improve the situation by reforming the legislation, there has been inadequate transformation of the criminal justice system which is charged with implementing the Domestic Violence Act. The societal reinforcement of gender roles that expect men to be in control and head of the household have left women with limited to non-existent financial assistance when they are financially dependent upon their partners. Even when they have left their partners, the limited effectiveness of the current Maintenance Act often keeps women poor, or still subject to their partner's control.

iii. Customary Law

In South Africa (and elsewhere) the customary law dilemma is invariably conceptualized as a terrible clash between culture or the cultural rights of historically marginalized communities on the one hand, and the equality rights of women (a disadvantaged group within these disadvantaged communities) on the other. Given the language in the Constitution, which guarantees equality, and in the Bill of Rights, which guarantees the right to participate in the culture of choice, it seems clear that on a formal level the final Constitution ensures that competing rights like equality or dignity will simply prevail over cultural rights. However, the substantive position is far more complex because the content that the judiciary will give to competing rights is far more malleable. This is especially true as the Constitution Court has insisted that equality claims must be firmly situated and understood in their social context. There seems to be general acceptance that there is a simple contrast between the values of equality and culture. It may be more fruitful to see customary law disputes about gender equality as intra-cultural conflicts between 'internal' women

and other members of the group. When these disputes come to court, the site of an internal struggle is simply moved to the courts with constitutional jurisdiction, making it appear as if culture and 'western' rights are in conflict. By recasting this conflict as an intra-cultural struggle regarding equality, the dichotomy is broken down and the contention that equality is the imposition of western values is nullified. What remains is a way of redefining culture, with the possibility of transforming non-Western institutions.